

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-005841-007 DT

05/26/2011

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
S. LaMarsh
Deputy

STATE OF ARIZONA

BRETT JAMES HARAMES

v.

FAUSTINO MARTINEZ GARCIA (007)

ROBERT W PRECHT

VICTIM SERVICES DIV-CA-CCC

RULING MINUTE ENTRY

On February 14, 2011, this Court ruled on suppression motions filed by Defendant Hernandez-Flores granting in part his request and directing a *Franks*¹ hearing on a limited issue. The pertinent portion of this Court's order stated as follows:

The affidavits presented a connection between the seizure of \$ 1.3 million as narcotic proceeds that were destined for Contreras. The Court finds such connection between CS#1 knowledge of where the money was coming from, that it was proceeds, and who it was destined for here in Arizona to be important to the probable cause contained in the affidavits. It is unclear to the Court that the affidavits correctly set forth the knowledge of the affiants. Therefore, limited to the issue of the affiants' knowledge surrounding the seizure of the \$ 1.3 million as narcotic proceeds destined for Contreras, the Court finds that Defendant has set forth a colorable claim warranting a *Franks* hearing on this issue.

The *Franks* hearing proceeded on February 25 and 28, 2011 with the testimony of Detective Laura Beeler and DEA Special Agent Dustin Gillespie. On April 28, 2011 evidence continued

¹ In *Franks v. Delaware*, 438 U.S. 154 (1977), the Supreme Court held that a Defendant is entitled to an evidentiary hearing upon a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, is included by an affiant in a warrant affidavit.

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with the examination of Moises Orozco. The Court received 21 exhibits at the hearing. At the conclusion of the hearing, the Court directed the parties to submit simultaneous memoranda and replies. The Court has reviewed the memoranda and entertained oral argument from counsel. This is the Court's ruling minute entry.

The Law

Every application for electronic surveillance must include a "full and complete statement" establishing probable cause that a particular person involved in a designated crime will have a discussion pertinent to that crime using a particular phone during a specified time period. Under this requirement, the reviewing judge "relies on the government to present the full case for its belief in probable cause, including any contraindications." *United States v. Nelson-Rodriguez*, 319 F.3d 12, 33 (1st Cir., 2003).

If a Defendant establishes by preponderance of evidence that the magistrate or judge in issuing the warrant was misled by information in the affidavit that the affiant knew was false, or would have known was false except for his reckless disregard of the truth, then suppression is an appropriate remedy. *Franks*, 438 U.S. at 156 (1978), *United States v. Stanert*, 762 F.2d 775, 780 (9th Cir., 1985). In *State v. Buccini*, the Arizona Supreme Court set the standard of review for courts adjudicating a *Franks* claim:

We realize that probable cause is a somewhat "fluid concept" that turns on "the assessment of probabilities in particular factual contexts." [*Illinois v. Gates*, 462 U.S. [213,] 232 [1983]]. We also agree that "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause..." *United States v. Leon*, 468 U.S. 897, 914 (1984). However, even if this were a close case on the probable cause finding, policy considerations militate in favor of resolving this probable cause determination in the Defendant's favor.

The rule in non-*Franks* cases considers the general presumption of validity of a search warrant and the deference given to a magistrate's determination of probable cause in concluding that in a "doubtful or marginal case a search under a warrant may be sustainable where without one it would fail." See 2 w. la fave, search & seizure § 4.4 at 199 (2d ed. 1987) (quoting *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965)). The same rule, however, does not apply to a *Franks* case. To the contrary:

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[W]hen it has been established that the earlier finding of probable cause was based upon a broader set of “facts,” some of which are now shown to be false, there is no longer any reason to give deference to that earlier finding. Thus, when a court reassesses a search warrant affidavit with the false allegations excised, a “doubtful or marginal case” should be resolved in the defendant's favor. That is, in such circumstances the probable cause determination should be made as it would upon a motion to suppress evidence obtained without a warrant.

Id.

167 Ariz. 550, 558 (1991). The court in *Buccini* concluded, “[W]e firmly adhere to these policies and believe that where the officer has deliberately or recklessly made material misstatements and omissions in the original affidavit, it is appropriate to resolve marginal probable cause determinations in such a manner as will best uphold the integrity of the fourth amendment.” 167 Ariz. at 558.

The Case at Bar

The Court order focused the inquiry upon the affiants’ knowledge concerning the seizure of the \$ 1.3M as drug proceeds destined for Contreras. That knowledge was founded upon information provided by CS#1 and Orozco to Detective Beeler. The Court finds that the Defense proved by a preponderance of the evidence that Detective Beeler provided false and misleading statements and omitted material facts. For the reasons discussed below, the Court finds that Detective Beeler is not a reliable witness, and information from her that is not independently corroborated is suspect. Since her uncorroborated information was important to the determination of probable cause, the Court finds the motion must be granted.

The affidavit states the "Glendale Police Department investigators received information from CS#1 regarding a vehicle containing a large sum of narcotic proceeds were destined for Noel Contreras in Phoenix, Arizona.”² Contrary to the information portrayed as facts in the

² The Court agrees with the State's assertion that the independent seizure of the \$ 1.3 million shows that the money was drug proceeds. The packaging of the money, its location in the cab of the semi-truck, and the Docket Code 023

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affidavit, CS#1's tip on May 11, 2009 was only that the truck was back in Arizona. The tip did not include that the truck was loaded with narcotic proceeds destined for Contreras. Detective Beeler made a number of assumptions, and these assumptions were presented as fact. Contrary to what was presented as facts, truck driver Orozco told Detective Beeler that his involvement was directed by a Hispanic male, Cacho, whom he met in Oklahoma. This was omitted from the affidavit.

During a Rule 15 interview, Detective Beeler indicated that the tip was nothing more than a phone call from CS#1 stating that "I think that the truck is coming back and it's in Arizona." This was confirmed by her testimony at the hearing.

In a dialogue with the Court regarding the tip, Detective Beeler indicated that the foundation for the statement in the affidavit that Contreras was the intended recipient was based on assumptions.

The Court: The affidavit says that the CI told you it [narcotic proceeds] was destined for Contreras; is that correct?

The Witness [Detective Beeler]: He did in the sense that Mr. Contreras is telling him that the semi is coming back. The CS is assuming the semi is coming back to Mr. Contreras.

(Defendant's Post-Hearing memo at 8 citing RT 2-25-2011, 39-40.) At the hearing, Detective Beeler acknowledged the information that the truck was destined for Contreras was based on her assumptions.

To corroborate that the proceeds were destined for Contreras, Detective Beeler testified that a couple of weeks after the seizure, Contreras told CS#1 that he had lost a large amount of money up at Camp Verde. This purported statement of CS#1 does not exist in any report. It does not exist in the Affidavit. Nor was this statement offered by Detective Beeler in response to questioning during her Rule 15 interview.

unbelievable story offered by Orozco for origin all would be indicia of drug proceeds. What the evidence does not show is that these proceeds were destined for Contreras.

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Given that there were no facts to offer the reviewing court that the drug money was coming to Contreras, a reasonably well-trained investigator would have examined the phone records of Orozco and reported those findings regarding who he was in contact with while driving to and while in Arizona before the seizure. This was not done.

Orozco's business cell records (Exhibit 19), which were not disclosed or discussed in the original affidavit, do not support the claims in the affidavit. These records document the time of calls made and received, numbers, and the general locations of the calls. These records show 19 phone calls from an unidentified 602 prefix from May 2, 2009 to May 11, 2009 and nothing thereafter. There are eight calls on May 2, 2009 between Orozco and the 602 number when the surveillance at the Arizona truck stop was being conducted by Detective Beeler. Surveillance was done between 2:49 p.m. and 4:14 p.m., and the six calls occur between 11:59 a.m. and 3:48 p.m. There are nine calls on May 5, 2009 when Orozco was in Michigan. There were two calls when Orozco was in Pennsylvania and New Jersey. There was a call at 6:59 p.m. on May 8, 2011, and one call at 1:46 p.m. in Arizona on May 11, 2009, 15 minutes before he was stopped by DPS. These records appear to establish that, contrary to the government's theory presented to the issuing judge, an unidentified individual in Arizona with a different phone number was in contact with Orozco at key times when Orozco was in both Arizona and Michigan. This number was never investigated by the government, and has not been attributed by the government to Contreras, Hernandez-Flores, or any other person that is identified in the Affidavit.

The Affidavit presented only the records of phone number 602-349-4433 and alleged that this phone, which CS#1 said belonged to Contreras, was in contact with Orozco 30 times on May 5, 2009 when Orozco was in Detroit. However, there was no corroborating evidence that this number was utilized by Contreras and no other contact prior to May 5, 2009. Furthermore, there was no evidence presented to the issuing court or to this Court of any contact between these numbers after May 5, 2009. The stated reason why this information was not presented was that at the time of the application, investigators only had records through May 8, 2011.

Detective Beeler's Credibility

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The Court is mindful of the unusual finding that a sworn police officer is not a credible witness. Therefore, the Court will set forth some of the other facts that lead the Court to that conclusion.

Detective Beeler was asked numerous times, and in various ways, if she had had any contact with Orozco after the May 11, 2009 seizure. Her response at hearing was that she had had contact with Orozco on only two occasions after the seizure and those contacts would have been in 2009. Orozco's toll records tell a different story. Those records show four calls in May 2009 and *eight* calls in February, 2011. Detective Beeler was not truthful with the Court and counsel about her contact with Orozco.

Detective Beeler explained her responses during an Internal Affairs' interview. Detective Beeler explained that she thought the defense was asking questions about 2009; that she was in a 2009 state of mind. But given the variety and number of the questions asked and specific dates involved, this explanation runs shallow.

Detective Beeler also testified about statements allegedly made to her by Orozco in a second interview at the time of the seizure. But there was no documentation regarding a second interview. Detective Beeler explained the absence of such documentation, stating that it was not documented in an effort to protect Orozco, who she claimed had offered cooperation in the second interview noted above. This answer also strains credibility. By the time of the Rule 15 interview, the information that Detective Beeler claimed came from a second interview was in the public domain, as it was in the June 26, 2009 Affidavit. Likewise, there is an absence of consistent reports concerning the alleged second interview with Orozco. DEA TFO Laudiel Pachico's report and DPS McFarland's report do not support Detective Beeler's claim of a second interview with Orozco.

As noted above, there is no document which memorializes the alleged admission by Contreras to CS#1 after the seizure. Detective Beeler failed to provide this alleged information during her Rule 15 interview. More troubling, however, is that CS#1 did not provide this information to Gillespie and Soto during their June 2, 2009 interview with the informant.

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After reviewing this and the other evidence presented, and having assessed her demeanor while testifying, the Court concludes that Detective Beeler has been less than candid with the Court.

IT IS ORDERED granting the Motion to Suppress. All direct and derivative evidence seized pursuant to the wire tap shall not be used in this case.

The Court has previously granted all co-Defendants' standing to join in the motion. Therefore,

IT IS FURTHER ORDERED granting the Motion to Suppress to all remaining co-Defendants in the case.

The Court has received Defendant Hernandez-Flores' Supplemental Memorandum Submitted under Seal Re: Probable Cause. The Court views the Memorandum as a Motion to Reconsider the denial of the Motion to Suppress on the basis of lack of necessity. As the Court has granted the Motion to Suppress on other grounds, the Court will take no action on the Motion to Reconsider. Should the Court's order of suppression be vacated by further proceedings, the Court will address the Motion to Reconsider.

IT IS ORDERED denying the Motion to Reconsider as moot.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Orders 2010-117 and 2011-10 to determine their mandatory participation in eFiling through AZTurboCourt.